

Judges on Judging

Judges and Legislators: Renewing the Relationship

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In this day of instant communication—faxes, video messages, worldwide satellite transmissions—one of the ultimate ironies is that members of the judiciary and Congress often fail to communicate about issues of mutual concern. In convoluted transmissions evoking images of “E.T., phone home,”¹ legislators and judges struggle to find appropriate “hook-ups” and often in good faith frustration simply cut the connection.

I am convinced that the separation of powers doctrine does not mean dead lines or, at best, garbled static. The complexities of the law-making and law-interpreting tasks in the third century of this republic cry out for systematic dialogue between those who make and those who interpret legislation. History suggests that dialogue between the legislative and judicial branches of government was anticipated by the framers of the Constitution. Common sense supports the notion that the public good—and the economy—would be served by enhanced communication between these branches. Even with enhanced dialogue, separation of powers would be preserved by each branch’s exercise of its primary power, structural constraints established by the Constitution, and the independence of the individual players.

Two recent debates highlight the importance of dialogue between the two branches. Both fall in the category of “we may not agree, but we might consider discussing our positions before we decide!” The first example is a piece of proposed legislation, which, if passed in its original form, would have had a significant impact on case management and procedure throughout the federal court system. Senate bill No. 2648,² later tagged the “Biden bill,” derived from a study by the Brookings Institution³ that apparently was produced with little input from the federal judiciary. The introduction of the legislation provoked concern among members of the judiciary and set up the two branches as adversaries on an issue where their ultimate goal was the same but views regarding the means of accomplishing that goal diverged substantially. Regardless of the merits of the various positions or of the legislation itself, early discussion be-

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1. *E.T.* (Lucasfilms 1982).

2. S. 2648, 101st Cong., 2d Sess., 136 CONG. REC. S.17570-02 (1990). The civil justice reform part of the Judicial Improvements Act of 1990, *id.*, began as Senate bill no. 2027, which later was incorporated into Senate bill no. 2648. See S. 2027, 101st Cong., 2d Sess. (1990).

3. REPORT OF A TASK FORCE, BROOKINGS INSTITUTION, JUSTICE FOR ALL (1989).

tween the judiciary and the bill's proponents *prior* to its introduction would have enhanced the understanding, avoided misunderstanding, and facilitated more efficient development of the law. Public and private "bickering" would have been minimized, and many hours would have been saved on both sides. Although the enacted legislation might have been the same in the end, government productivity and collegiality would have been served if all interested parties had made an earlier effort to communicate about the issues.

Another example of how communication would help both branches accomplish their goals is the recent debate about the value of legislative history in interpreting the law. Many judges are skeptical about the extent to which they should rely on legislative committee reports, remarks made during floor debates, and testimony at hearings interpreting a statute. In the context of discussing the majority's use of a committee report to interpret congressional intent behind the amendments to the Equal Access to Justice Act, for example, now Associate Justice Antonin Scalia has related Senator Robert Dole's concession during debate on the Senate floor that neither he nor any other Senator had actually written a particular report or read it in its entirety.⁴ Justice Scalia questions the common assumption that committee reports represent the collective understanding of members of Congress who shape the legislation, and he criticizes the "level of unreality that our unrestrained use of legislative history has attained."⁵ Other judges—including many who previously have served as members of Congress—point to legislative history as an important indicator of congressional intent.⁶ Some aspects of this debate cause legislators to wonder whether the judiciary adequately understands the legislative process, just as judges during the debates on the Biden bill wondered whether Congress understands the judicial process. Systematic discussion between the two branches would inform the debate on congressional intent, reduce misunderstandings, change some judges' philosophical stances toward legislative history, and enhance the clarity of statutory language.

The present dialogue between the judiciary and Congress tends to focus on those clear areas that affect judges directly as federal employees. In the important but difficult discussions on salary, benefits, and perquisites, judges must approach Congress to discuss a no-win political issue. As a result, a perception of self-interest naturally arises between the two branches. Neither side feels appreciated or understood. Because the "pay and perks" negotiation—an obvious example of communication neither branch can do without—takes place on a

4. See *Hirschey v. FERC*, 777 F.2d 1, 8 n.1 (D.C. Cir. 1985) (Scalia, J., concurring). For a detailed analysis of Justice Scalia's views, see generally, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160 (discussing Justice Scalia's textual approach to interpreting statutes and his originalist approach to the Constitution).

5. *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring); see Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 60.

6. See, e.g., Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627 (1987); see also *The Role of Legislative History in Judicial Interpretation: A Discussion Between Judge Kenneth W. Starr and Judge Abner J. Mikva*, 1987 DUKE L.J. 361; Mikva, *The Role of Legislative History in Judicial Interpretation: A Discussion Between Judge Kenneth Starr and Judge Abner J. Mikva: A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380.

regular basis, the likely perception in Congress is that judges only come to Capitol Hill to benefit themselves. Such a perception, though fairly accurate, does not reflect the degree and type of interaction judges would be willing to engage in if they could be reassured that their constitutional role, individual independence, and ethical responsibilities would not be compromised.

Even assuming the reluctance of legislators and judges to interact is grounded in an appropriate concern for separation of powers, our history is replete with examples of constructive dialogue between the branches serving the orderly development of our law. Separation was not intended to mean alienation or to create antagonistic positions. The relationship between the judiciary and Congress was not marked by professional distrust and begrudging compromise when the Constitution originally established separate branches with distinct powers. As the nation first developed under the political structure of the American Constitution, the branches worked together to define and develop the contours of our legal system within constitutional boundaries. For example, the Senate introduced as its first piece of legislation⁷ a bill that eventually became the Judiciary Act of Sept. 24, 1789.⁸ This Act, which became law without great controversy or fanfare, expanded the power of the judiciary by establishing a system of inferior federal courts not called for in the Constitution and by granting jurisdiction to the Supreme Court far beyond what was constitutionally required. Congress conceded the position of the federal judiciary as final interpreters of the law⁹ by not objecting to *Marbury v. Madison*.¹⁰ These two examples demonstrate a historical attitude remarkably different from the often hesitant, and sometimes heated, interaction between the judges and legislators of today.

This Article focuses on the relationship between the judiciary and Congress for the purpose of understanding what communication is appropriate based on the Constitution and other potential constraints. It first examines the Constitution and the relationship between Congress and the judiciary in the early years of the republic as the American theory of separation of powers developed, more or less, by trial and error.¹¹ The Article then discusses modern concerns that contribute to our current perception of appropriate interaction between judges and legislators.¹² Among these modern concerns are the statutory requirements relating to judicial conduct, the Judicial Code of Ethics, and other practical matters such as judges' and legislators' lack of familiarity with the individuals involved in, and the day-to-day operation of other branches of, government. Besides this lack of familiarity—an unfortunate result of the growing complexity of the legal system, the increased bureaucracy of administration in the federal

7. S. 1, 1st Cong., 1st Sess. (1789); see also Kastenmeier & Remington, *A Judicious Legislator's Lexicon to the Federal Judiciary* in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 58 (R. Katzmann ed. 1988).

8. Ch. 20, 1 Stat. 73.

9. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-2 (2d ed. 1988); R. ROTUNDA, J. NOWAK & J.N. YOUNG, *1 CONSTITUTIONAL LAW* §§ 1.13-1.4 (1986).

10. 5 U.S. 137, 177-78 (1803).

11. See *infra* Part I.

12. See *infra* Part II.

system, and the geographical separation that is not completely bridged by modern communication networks—these modern concerns establish few real limitations on communication between members of the judiciary and Congress.

Finally, this Article proposes a test by which legislators and judges can determine which specific interactions may legitimately cast doubt upon the independence of the judiciary.¹³ The Article seeks to encourage judges and legislators, who tend to draw the line conservatively to avoid the appearance of impropriety, to communicate in all appropriate ways. Together—with the sense of camaraderie that historically has characterized the relationship between Congress and the judiciary—we then can address more effectively, or at least more efficiently, the complex problems that face our legal system today.

I. THE HISTORICAL RELATIONSHIP BETWEEN CONGRESS AND THE JUDICIARY

A. *The Constitution*

Several provisions of the Constitution, including the life tenure and compensation requirements, the case or controversy limitation, and the separation of powers doctrine, appear to limit interaction between Congress and the judiciary. Much of the perceived impropriety of such interaction, however, is based simply on the doctrine of separation of powers. The perceived limitation on interaction between branches goes far beyond what the Constitution expressly requires.

The Constitution establishes the federal judiciary as a separate branch of government with important structural protections empowering it to operate independent of influence from Congress. Federal judges are appointed for life by the President with the advice and consent of the Senate.¹⁴ Article III provides that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."¹⁵ These guarantees ensure judges can decide cases without fear of adverse political or financial repercussions. Should a judge fail to maintain "good behavior" while serving on the bench, she may be removed only through the impeachment process authorized in article II.¹⁶

The only direct implication of these protections on interaction between the judiciary and Congress is that communication will take place, at a minimum, during the confirmation and impeachment processes. Indirectly, the fact that article III does not delineate further how the judiciary may protect its independence from improper congressional influence suggests these structural protections alone are sufficient.

A second constitutional concern affecting interaction between the judiciary and Congress is the case or controversy requirement of article III. The Supreme Court has interpreted the phrase, "judicial Power shall extend to all Cases,"¹⁷

13. See *infra* Part III.

14. U.S. CONST. art. II, § 2, cl. 2; Judiciary Act of 1789, ch. 20, 1 Stat. 73.

15. U.S. CONST. art. III, § 1.

16. U.S. CONST. art. II, § 4.

17. U.S. CONST. art. III, § 2.

as barring all article III courts from determining abstract, hypothetical, or contingent questions.¹⁸ This restriction means federal courts will not provide advisory opinions on cases that are not properly before them. It does not mean judges are restrained entirely from rendering advice about the law to Congress. The Supreme Court has never held the case or controversy requirement prohibits judges from advising Congress about the need for, or the problems with, a particular piece of legislation.

Although article III outlines to some extent the task of the judiciary and the protections designed to facilitate that task, often the separation of powers doctrine is mistakenly perceived as barring systematic communication between the legislature and the judiciary. The separation of powers doctrine is usually explained as one inferred from the tripartite structure of government, the enumeration of powers, and the system of checks and balances in the Constitution.¹⁹ Put simply, separation of powers prevents one branch from encroaching on the functions unique to another or from assuming functions that might diminish a branch's assigned position within the tripartite system. Although the doctrine may have implications on the interaction between Congress and the judiciary, the doctrine does not necessarily preclude all communication between the two branches.

One way to test whether constitutional separation of powers is a valid justification for limiting interaction between Congress and the judiciary is to consider its effect on communications between other branches of government. For example, no one would suggest that the President's communications with either the House or Senate erode the independence of the President's decision to veto a particular piece of legislation. Nor is regular interaction between legislators and the staff of administrative agencies regarded as destroying the independent judgment of either branch. Further, federal agencies often appear as parties or intervenors in cases filed in federal court and, in that capacity, directly address the judiciary. An officer or agent of the federal government may file an amicus brief in federal court without obtaining either the consent or leave of the court.²⁰ The activities of joint commissions such as the Sentencing Commission, composed of representatives from all three branches, clearly do not violate separation of powers.²¹ Although separation of powers allows these intercommunications, many judges and legislators still believe the Constitution is the reason for their inclination not to communicate with the other branch on a regular basis. This perception, however, is not derived from the separation of powers doctrine established in the Constitution.

B. *The Federalist Papers: Separate but Connected Branches*

An important value of the Federalist Papers, as of other historical documents from the colonial period, is the insight they offer into concerns about the

18. See, e.g., *Muskrat v. United States*, 219 U.S. 346, 362 (1911).

19. See, e.g., L. TRIBE, *supra* note 9, at § 2.2.

20. FED. R. APP. P. 29.

21. See *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding as constitutional the Sentencing Guidelines, the product of the Sentencing Commission).

American Constitution raised at the time of its adoption. Separation of powers was one of those concerns, although the practical implications of separation of powers in a tripartite system of government were virtually unknown at the time the Constitution was adopted. The discussion about separation of powers is found mainly in Federalist Nos. 47 and 48, written by James Madison, and Federalist Nos. 78 and 81, written by Alexander Hamilton.

In Federalist No. 47, Madison explained that separation of powers generally means the legislative, judicial, and executive powers should not be united in one person or body of government. Positing all three powers in one body, he noted, violates the principles of a free society: "[W]here the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."²² Checks and balances such as the presidential veto, legislative impeachment, and judicial appointment were important to Madison in establishing a "partial mixture of powers" because they allowed some control of one branch over another.²³ In Federalist No. 48, Madison pointed out that a certain degree of separation is always necessary so that "powers properly belonging to one of the departments [are] not . . . directly and completely administered by either of the other departments."²⁴ For Madison, however, separation of powers did not mean complete isolation between the three branches: Unless the departments are "connected and blended," the "degree of separation . . . essential to a free government [] can never in practice be duly maintained."²⁵

Thus, Madison's writings demonstrate a conviction that separation of power was not meant to be *total* separation or an unnatural isolation of members of one branch from the others. Rather, separation of powers was established by granting each of the three branches of government primary responsibility for the tasks of enacting, interpreting, or enforcing the law. Additionally, each branch is partially responsible for restraining the other branches through a system of checks and balances expressly established in the Constitution. As long as these structural protections are maintained, according to Madison, the proper degree of separation will not be disturbed by interaction between the branches that would connect and blend them. Moreover, Madison suggested that such interaction is necessary to maintain the proper functioning of a free government.

The writings of Hamilton also provide insight into some historical concerns about the relation of the judiciary to the legislature. Hamilton predicted in Federalist No. 78 that the legislature naturally will tend to dominate over the judiciary because it commands the purse and prescribes the rules that regulate the "duties and rights of every citizen."²⁶ However, an independent judiciary pro-

22. THE FEDERALIST No. 47, at 338 (J. Madison) (B. Wright ed. 1961) (emphasis in original). For a comprehensive discussion of one source of inspiration for our tripartite system of government, see Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPPERDINE L. REV. 201 (1991).

23. *Id.* at 339-40.

24. THE FEDERALIST No. 48, at 343 (J. Madison) (B. Wright ed. 1961).

25. *Id.*

26. THE FEDERALIST No. 78, at 490 (A. Hamilton) (B. Wright ed. 1961).

tected by life tenure is the best way "to secure a steady, upright, and impartial administration of the laws" according to Hamilton.²⁷ He described the courts as an "intermediate body between the people and the legislature" to interpret the laws and help confine the legislature to its own scope of authority.²⁸ Hamilton reiterated this idea of judicial intermediation in Federalist No. 81 by explaining that popular fears of judicial encroachment on the authority of the legislature are "in reality a phantom" because the judiciary lacks power to enforce the law—power with which it also might "usurp" the authority of the other branches.²⁹ According to Hamilton, any fears of an imbalance arising from the judiciary's actions are unsubstantiated because of the "complete security" the threat of impeachment provides.³⁰

The writings of both Hamilton and Madison about the judiciary and separation of powers in the Federalist Papers give no indication that the framers were concerned about possible harm that might result from regular public and personal interaction between Congress and the federal judiciary. The Federalist Papers demonstrate confidence in the structural protection of the Constitution provided by three separate branches with distinct functions plus the additional security of specific checks and balances. In order for a tripartite system to function smoothly, however, Madison emphasized the branches must blend and connect. Hamilton focused on the importance of upright and impartial administration of the law in federal courts—a goal he believed would be achieved by appointing judges for life. The writings of neither man demonstrate any notable concern that communication between judges and legislators, in either their official or personal capacities, would destroy the vitality of separation of powers or the impartiality of federal judges.

C. *Historical Connections Between the Two Branches*

The historical record of our nation is replete with examples of overlapping responsibilities and close interaction between Congress and the judiciary. Although the possibility of simultaneous responsibility in both branches has been largely foreclosed in the modern era—to the great relief of overworked legislators and judges—the regular, uninhibited interaction between members of both branches as they went about their official duties and their personal lives remains an example for us today.

Many men first appointed as federal judges participated in the debates of the Constitutional Convention and the creation of the new republic. Among the twelve justices who sat on the Supreme Court during its first decade of operation, six had served in the Continental Congress, four served in the Confederation Congress, and two served in the federal Congress.³¹ The five who did not

27. *Id.*

28. *Id.* at 492.

29. THE FEDERALIST No. 81, at 508 (A. Hamilton) (B. Wright ed. 1961).

30. *Id.* at 509.

31. Marcus & Van Tassel, *Judges and Legislators in the New Federal System, 1789-1800*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 32 (R. Katzmann ed. 1988). See generally, 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 (Part 1) (M. Marcus & J. Perry eds. 1985)

serve in any national Congress participated in the state ratification conventions.³² This experience gave them insight into the legislative process as a whole and the frustrations members of Congress would feel as they began to enact legislation consistent with the constitutional framework the states had adopted.

Many federal judges gave formal advice to Congress on an individual basis about a variety of issues that eventually were reviewed in federal court. For example, when Congress sought to amend the Judiciary Act in the 1790s, Supreme Court Justices worked with a congressional committee as it drafted the bill.³³ Associate Justices William Paterson³⁴ and Bushrod Washington³⁵ even offered their own version of the bill to Congress based on what they thought was necessary to reform the federal judicial system.³⁶ After Congress finally settled on a draft version, several Justices were asked specifically for their comments.³⁷

Federal judges performed various extrajudicial governmental functions in the new republic during their tenure on the bench.³⁸ For example, Congress appointed the Chief Justice of the Supreme Court as a commissioner of the Sinking Fund during an early attempt to reduce public debt.³⁹ The Chief Justice also was appointed inspector of the United States Mint.⁴⁰ Further, Congress required federal district judges to conduct jail proceedings under the Debtors' Relief Act of 1796.⁴¹ When congressional elections were contested, district judges were required to question witnesses about the actions of local officials in conducting the election and then report to Congress.⁴² District judges also investigated petitions concerning unintentional violations of the customs laws and sent the results to the federal Treasury Secretary for determination of an appropriate fine.⁴³ Finally, district judges were responsible for the frequent task of evaluating the moral character of aliens who requested citizenship through the process of naturalization.⁴⁴

In addition to the formal functions they performed, federal judges often lobbied for specific legislative changes by approaching members of Congress on an informal basis. A brief review of the communication by mail between federal judges and federal and state legislators demonstrates the wide range of political

[hereinafter DOCUMENTARY HISTORY (I,I)] (providing biographical sketches of each Supreme Court Justice from the first appointment, John Jay, in September 1789 to John Marshall's appointment as Chief Justice in 1801).

32. Marcus & Van Tassel, *supra* note 31, at 32.

33. *Id.*

34. William Paterson (1745-1806) served as a delegate from New Jersey to the Constitutional Convention, United States Senator from 1789 to 1790, Governor of New Jersey from 1790 to 1793, and Associate Justice on the Supreme Court from 1793 to 1806. For additional biographical information, see DOCUMENTARY HISTORY (I,I), *supra* note 31, at 82-93.

35. Bushrod Washington (1762-1829) served as a member of the Virginia House of Delegates from 1787 to 1788 and Associate Justice on the Supreme Court from 1798 to 1829. For additional biographical information, see DOCUMENTARY HISTORY (I,I), *supra* note 31, at 124-36.

36. Marcus & Van Tassel, *supra* note 31, at 43.

37. *Id.*

38. See generally, Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123.

39. Act of Aug. 12, 1790, ch. 47, 1 Stat. 186.

40. Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 250.

41. Act of May 28, 1796, ch. 38, 1 Stat. 482.

42. Act of Jan. 23, 1798, ch. 8, § 1, 1 Stat. 537.

43. Act of May 26, 1790, ch. 12, 1 Stat. 122-23.

44. Act of Jan. 29, 1795, ch. 20, 1 Stat. 414-15.

and social concerns that members of both branches shared. For example, Associate Justice William Cushing⁴⁵ wrote Massachusetts Congressman Theodore Sedgwick⁴⁶ about the importance of promoting a bill for the compensation of federal grand jury members.⁴⁷ Congressman Henry Glen⁴⁸ notified John Jay⁴⁹ of the Senate's confirmation of Jay's appointment as Chief Justice as soon as the vote was completed.⁵⁰ Theodore Sedgwick wrote Chief Justice John Jay about a government job for one of his friends from Boston.⁵¹ Chief Justice Jay wrote Congressman Fisher Ames⁵² thanking him for recommendations for candidates for federal appointments.⁵³ Congressman William Loughton Smith⁵⁴ wrote to Senior Associate Justice Edward Rutledge⁵⁵ about Congress's views on the proper attire of the Court, the design of the Seals, and circuit assignments.⁵⁶ Congressman Jonathan Dayton⁵⁷ wrote Justice Paterson about various subjects including news of the nomination of John Marshall—rather than Paterson—as Chief Justice, compromises arising from the politics of the nomination, and his

45. William Cushing (1732-1810) served as Associate Justice on the Supreme Court from 1789 to 1810. For additional biographical information, see DOCUMENTARY HISTORY (I,I), *supra* note 31, at 24-30.

46. Theodore Sedgwick (1746-1813) served as a member of the House of Representatives from 1789 to 1796 and from 1799 to 1801, United States Senator from 1796-99, and as a judge on the Supreme Judicial Court of Massachusetts from 1802 to 1813. See 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 (Part II) 665 n.* (M. Marcus & J. Perry eds. 1985) [hereinafter DOCUMENTARY HISTORY (I,II)].

47. Letter from William Cushing to Theodore Sedgwick (Feb. 21, 1791), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, 139-40 (M. Marcus ed. 1988) [hereinafter DOCUMENTARY HISTORY (II)].

48. Henry Glen (1739-1814) served as clerk of Schenectady County, New York from 1767-1809 and then as congressman from New York from 1793-1801. See DOCUMENTARY HISTORY (I,II), *supra* note 46, at 905 n.

49. John Jay (1745-1830) served as the first Chief Justice of the Supreme Court from 1789 to 1795, when he resigned to become Governor of New York. For further biographical information, see DOCUMENTARY HISTORY (I,I), *supra* note 31, at 3-14.

50. Letter from Henry Glen to John Jay (Dec. 20, 1800), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 905.

51. Letter from Theodore Sedgwick to John Jay (Sept. 23, 1789), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 665.

52. Fisher Ames (1758-1808) represented Massachusetts in the House of Representatives. See DOCUMENTARY HISTORY (I,I), *supra* note 31, at 178 n.27.

53. Letter from John Jay to Fisher Ames (Nov. 27, 1789), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 680.

54. William Loughton Smith (1758-1812) served in the South Carolina House of Representatives from 1794 to 1798 and in the First Congress from 1789 to 1797. See DOCUMENTARY HISTORY (I, II), *supra* note 46, at 695-96 n.

55. John Rutledge (1739-1800) served as a representative of South Carolina at the First and Second Continental Congresses, the first president of the South Carolina Republic from 1776 to 1778, Governor of South Carolina from 1779 to 1782, member of the House of Representatives from 1782 to 1784, and a representative of South Carolina at the Constitutional Convention. In 1789, President Washington appointed Rutledge as Senior Associate Justice of the Supreme Court. Rutledge resigned from this position in March 1791 to become Chief Justice of the South Carolina Court of Common Pleas. In June 1795, assuming John Jay would resign as Chief Justice of the Supreme Court to accept his election as Governor of New York, Rutledge wrote President Washington to offer his services. Washington gratefully accepted. The Senate, however, rejected this nomination because of Rutledge's vocal opposition to the Jay Treaty. For more biographical information, see DOCUMENTARY HISTORY (I,I), *supra* note 31, at 15-23.

56. Letter from William Loughton Smith to Edward Rutledge (Feb. 13, 1790), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 695.

57. Jonathan Dayton represented New Jersey in the House of Representatives from 1791 to 1799 and was a member of the Senate from 1799 to 1805. See DOCUMENTARY HISTORY (I,II), *supra* note 46, at 918 n.

general disgust with President Adams' administration.⁵⁸ Justice Paterson then wrote Dayton back about Marshall's genius and what Patterson considered the proper perspective on recent political developments.⁵⁹

Associate Justice James Iredell⁶⁰ maintained communication with many members of Congress. He and his brother-in-law, Senator Samuel Johnston,⁶¹ corresponded on a regular basis about various topics including dinner parties with the President,⁶² likely candidates for appointment to the Supreme Court,⁶³ Iredell's impending nomination as an Associate Justice,⁶⁴ what colleagues in the Senate had said about Iredell in the confirmation hearings,⁶⁵ Iredell's despair upon hearing he was assigned first to ride the Southern Circuit,⁶⁶ the Senate's rejection of Associate Justice Rutledge's nomination to Chief Justice after his public attack on the Jay Treaty at Saint Michael's Church in Charleston,⁶⁷ and even poor Justice Wilson's unfortunate business and personal affairs.⁶⁸ Senator Pierce Butler⁶⁹ wrote Justice Iredell to congratulate him on his recent appointment to the Court and to recommend accommodations in New York City.⁷⁰ North Carolina state legislator Archibald Maclaine wrote Justice Iredell about

58. Letter from Jonathan Dayton to William Paterson (Jan. 20, 1801), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 918; Letter from Jonathan Dayton to William Paterson (Jan. 28, 1801), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 923.

59. Letter from William Paterson to Jonathan Dayton (Jan. 25, 1801), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 920-21 (Paterson advised Dayton not to take recent developments too seriously, stating: "Give me the easy chair of the jolly, laughing philosopher, Democritus, and anybody for me shall be welcome to the gloomy tub of weeping Heraclitus.").

60. James Iredell (1751-1799) served as a North Carolina Superior Court Judge and delegate to the North Carolina ratification convention before being appointed as Associate Justice the United States Supreme Court in 1790. For further biographical information about Justice Iredell, see DOCUMENTARY HISTORY (I,I), *supra* note 31, at 60-68.

61. Samuel Johnston (1733-1816) was a Senator from North Carolina. DOCUMENTARY HISTORY (I,I), *supra* note 31, at 540 n.7.

62. Letter from Samuel Johnston to James Iredell (Feb. 4, 1790), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 688-89.

63. Letter from Samuel Johnston to James Iredell (Dec. 1, 1789), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 681; *see also* Letter from Samuel Johnston to James Iredell (Feb. 27, 1796), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 840 (discussing Justice Cushing's refusal to be Chief Justice, qualifications of Associate Justice Samuel Chase).

64. Letter from Samuel Johnston to James Iredell (Feb. 7, 1790), *reprinted in* DOCUMENTARY HISTORY (I,I), *supra* note 31, at 64.

65. Letter from Samuel Johnson to James Iredell (Feb. 11, 1790), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 694.

66. Letter from Samuel Johnston to James Iredell (Mar. 18, 1790), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 703.

67. Letter from Samuel Johnston to James Iredell (Jan. 9, 1796), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 825. For further information about Justice Rutledge's views on the Jay Treaty, see DOCUMENTARY HISTORY (I,I), *supra* note 31, at 17.

68. Letter from Samuel Johnston to James Iredell (July 28, 1798), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 859. For further details about Justice Wilson's life, see DOCUMENTARY HISTORY (I,I), *supra* note 31, at 44-53; Letter from John Quincy Adams to Thomas Boylston Adams (June 23, 1793), *reprinted in* DOCUMENTARY HISTORY (II), *supra* note 47, at 408-10; Letter from James Iredell to Hannah Iredell (Aug. 11, 1797), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 856-57.

69. Pierce Butler (1744-1822) served in the South Carolina legislature from 1778 to 1782 and 1784 to 1789, represented South Carolina in the Constitutional Convention, and served as a United States Senator from 1789 to 1796. *See* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 662 n.2.

70. Letter from Pierce Butler to James Iredell (Feb. 10, 1790), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 692-93.

the impending announcement of Iredell's appointment⁷¹ and the best route to take when riding the Southern Circuit.⁷²

The failure of the riding circuit, as originally designed by Congress, provoked a heated exchange of correspondence. District Judge David Sewell⁷³ wrote Congressman George Thatcher⁷⁴ about the dire need for congressional reform of the circuit system.⁷⁵ Court clerk Simeon Baldwin⁷⁶ wrote in complaint to Congressman Uriah Tracy⁷⁷ about his general dissatisfaction with the circuit system and the serious delay caused by the failure of a Supreme Court Justice to show up on a regular basis for circuit court.⁷⁸ Senator Rufus King⁷⁹ and Chief Justice Jay corresponded about the problem of inconsistent judgments resulting from the difficulties involved in reporting the decisions made while riding circuit.⁸⁰

These examples and many others illustrate the extent to which members of the judiciary and state and federal legislatures interacted during the early years of the republic. Although ideas about the propriety of regular communication and most extrajudicial appointments have changed substantially during the last two centuries,⁸¹ these historical examples clearly refute the common perception that the relationship between legislators and judges always has been strained.

These examples also demonstrate that judges have not always isolated themselves from other branches of government to preserve their impartiality. The present lack of communication about many areas of common concern is not supported by the framers' view about separation of powers or the appropriate relation between Congress and the judiciary, although it may be related to a natural tendency on the part of judges and members of Congress to avoid *all* interaction so as to avoid the appearance of impropriety. This modern preoccupation with possible impropriety—to the extent it limits mutual cooperation and useful interaction—must be remedied to prevent intergovernmental antagonisms. In light of these examples of everyday interaction that enabled the legis-

71. Letter from Archibald Maclaine to James Iredell (Mar. 10, 1790), *reprinted in* DOCUMENTARY HISTORY (I,II), *supra* note 46, at 702.

72. Letter from Archibald Maclaine to James Iredell (Mar. 10, 1790), *reprinted in* DOCUMENTARY HISTORY (II), *supra* note 47, at 14.

73. David Sewell (1735-1825) served as district judge of Maine from 1789 to 1818. DOCUMENTARY HISTORY (II), *supra* note 47, at 70 n.

74. George Thatcher (1754-1824) served as district judge of Maine from 1789 to 1818. DOCUMENTARY HISTORY (II), *supra* note 47, at 70 n.

75. Letter from David Sewell to George Thatcher (Nov. 25, 1792), *reprinted in* DOCUMENTARY HISTORY (II), *supra* note 47, at 334.

76. Simeon Baldwin (1761-1851) served as clerk of the United States district and circuit courts for the district of Connecticut. *See* DOCUMENTARY HISTORY (II), *supra* note 47, at 453 n.

77. Uriah Tracy (1755-1807) represented Connecticut in the House of Representatives from 1793 to 1796. DOCUMENTARY HISTORY (II), *supra* note 47, at 453 n.

78. Letter from Simeon Baldwin to Uriah Tracy (May 5, 1794), *reprinted in* DOCUMENTARY HISTORY (II), *supra* note 47, at 452-53.

79. Rufus King (1755-1827) served as a delegate from Massachusetts to the Confederation Congress and the Constitutional Convention and a Senator from New York from 1789 to 1796. DOCUMENTARY HISTORY (I,II), *supra* note 46, at 642 n.

80. Letter from John Jay to Rufus King (Dec. 19, 1793), *reprinted in* DOCUMENTARY HISTORY (II), *supra* note 47, at 434; Letter from John Jay to Rufus King (Dec. 22, 1793), *reprinted in* DOCUMENTARY HISTORY (II), *supra* note 47, at 434-35.

81. *See infra* Part II.B.

lators and judges who devised our purely American form of separation of powers to "connect and blend," we now examine the modern concerns that define appropriate interaction between Congress and the judiciary.

II. MODERN CONCERNS DEFINING APPROPRIATE INTERACTION

A. *Statutes*

Like the Constitution, statutes offer limited guidance on the appropriate relationship between the judiciary and Congress. Among the statutes directly regulating judicial activity are the laws requiring financial disclosure, laws regulating conflicts of interest, and laws establishing the Judicial Conference and the Administrative Office.

Like other federal personnel, judges are required to report to the executive branch their income and investments within a certain period of time of their federal appointment. This information is made available to the congressional committee considering their nomination.⁸² Although the law requires judges to communicate important financial information to Congress, it does not define the scope of communication between the legislature and the judiciary on other topics of mutual interest.⁸³

Judges are, of course, affected by various laws implicating staffing, use of appropriated funds, supplies, chambers, and similar components of the federal budget. Recently, Congress placed a workload certification requirement on federal judges who have elected senior status.⁸⁴ Again, these statutes do not limit in any notable way the extent to which judges and legislators may interact on matters of mutual concern.

A federal judge is prohibited by statute from considering a case where she may have a conflict of interest.⁸⁵ The statute is intended to foster impartiality by regulating even the appearance of impropriety.⁸⁶ However, it does not prevent judges from communicating with legislators about issues of mutual concern. In *Laird v. Tatum*,⁸⁷ now Chief Justice Rehnquist concluded that the conflicts of interest statute does not require a judge to recuse herself if before her nomination she expressed her understanding of the meaning of a particular provision of the Constitution at issue in a case.⁸⁸ Based on the Chief Justice's position in *Laird*, public comment on proposed legislation does not rise to a conflict of interest when the proper interpretation of that statute later is presented to the court as a legal issue.

82. 5 U.S.C. § 103(c), (d) (1988).

83. 5 U.S.C. §§ 101-109 (1988).

84. 28 U.S.C. § 371(b)(1), (f) (1988).

85. 28 U.S.C. § 455 (1988).

86. See *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).

87. 409 U.S. 824 (1972).

88. *Id.* at 839.

Congress also has established by statute the Judicial Conference⁸⁹ and the Administrative Office⁹⁰ of the United States to administer the federal court system. The Judicial Conference and the Administrative Office have increased significantly the level and means of communication between members of the judiciary and Congress through official channels. For example, last year in an official press conference at the Supreme Court, Chief Justice Rehnquist addressed the impact of inadequate pay for judicial officers on the federal judiciary.⁹¹ This press conference was the first ever held by a Chief Justice.⁹² In connection with the Administrative Office, judicial officers and representatives made at least sixty-nine appearances for public testimony before the 100th Congress and seventy-eight appearances before the 101st Congress.⁹³ Further, a Federal Courts Study Committee was created by statute in 1988 to examine and report on issues facing the judiciary, including methods of alternative dispute resolution, the structure and administration of the federal court system, means of resolving intra-circuit and inter-circuit splits on legal issues and methods of advising Congress and others on the law.⁹⁴ The Study Committee brought together members of the judiciary and Congress to discuss these areas of common concern; among its fifteen participants were six judges and four legislators.⁹⁵

An important initiative in the effort to facilitate communication between the judiciary and legislature was the establishment in 1986 of the Governance Institute. The Governance Institute is a small not-for-profit organization concerned with exploring, explaining, and easing problems associated with the separation of powers in a democratic polity. Under the leadership of Judge Frank M. Coffin,⁹⁶ for example, the Committee on the Judicial Branch of the Judicial Conference of the United States has pursued through the Governance Institute an examination of past, present, and future relations between Congress and the judiciary. In a workshop sponsored by the Institute in 1989, judges, legislators, and academics met to examine and discuss many facets of judicial and legislative interaction. The Committee on the Judicial Branch and the Institute continue to focus on these important issues.⁹⁷

89. 28 U.S.C. § 331 (1990).

90. *Id.* § 601.

91. *L.A. Times*, Mar. 15, 1990, at A2, col. 3.

92. Telephone interview with David A. Sellers, Public Information Officer, Office of Legislative and Public Affairs, Administrative Office of the United States Courts (Nov. 29, 1990).

93. *Id.*

94. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §§ 101-109, 102 Stat. 4642 (1988).

95. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 101ST CONG., 1st SESS. (Part II) (Committee Print 1990). The members of the Federal Courts Study Committee were Judge Joseph F. Weis, Jr., Chairman; J. Vincent Aprile II; Chief Justice Keith M. Callow; Edward S.G. Dennis, Jr.; Morris Harrell; Rep. Robert W. Kastenmeier; Rex E. Lee; Diana Gribbon Motz; Judge Jose A. Cabranes; Judge Levin H. Campbell; Sen. Charles E. Grassley; Sen. Howell Heflin; Judge Judith N. Keep; Rep. Carlos J. Moorhead; and Judge Richard A. Posner. *Id.*

96. Circuit Judge, United States Court of Appeals for the First Circuit.

97. I thank my friend and respected colleague Judge Frank Coffin for his valuable assistance in reviewing this paper and providing historical perspective on the work of the Committee on the Judicial Branch, which he chaired from 1983 to 1990. I also thank Robert Katzmman, President of the Governance Institute, for material he provided about the Institute.

The interaction that takes place on a regular basis through the various activities of these official bodies does not imply that judges in general may not communicate with Congress as Conference members, as committee heads, or simply in their individual capacities about Conference decisions or anything besides Conference business. Of course, it is important that judges be aware of the official Conference position and distinguish clearly between their personal views and Conference policy when communicating with members of Congress. The effectiveness of the Judicial Conference's legislative initiatives depends on the judiciary speaking clearly with one voice when articulating official Conference positions.

B. *The Code of Judicial Conduct*

The revised Model Code of Judicial Conduct (Model Code), adopted by the House of Delegates of the American Bar Association in August 1990,⁹⁸ affects to a much greater degree the interaction between judges and Congress than does either the Constitution or federal law. As stated in the preamble, the purpose of the Model Code is to establish standards for the ethical conduct of judges to ensure an "independent, fair and competent judiciary will interpret and apply the laws that govern us."⁹⁹ In adopting the revision, the American Bar Association was concerned that judges "respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."¹⁰⁰ The most important parts of the Model Code relating to communications with the legislature are those concerning *ex parte* and public communications (Canon 3), extrajudicial activities (Canon 4), and inappropriate political activities (Canon 5).

Canon 3 of the Model Code generally prohibits *ex parte* and public communications during a pending or impending proceeding. *Ex parte* communications are communications that involve fewer than all the parties legally entitled to participate in a discussion of any matter.¹⁰¹ According to Canon 3.B(7), "[a] judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding."¹⁰² The provision lists five broad exceptions to this prohibition: (1) communications related to scheduling, administration, or procedural emergencies under some limited circumstances; (2) communications to solicit advice from a "disinterested expert on the law"; (3) consultations with other judges or court personnel; (4) conferences with the parties and their lawyers in an effort to mediate or settle; and (5) other *ex parte* communications expressly authorized by law.¹⁰³

The commentary to this provision explains the proscription against *ex parte* communications about a proceeding applies to communications with all persons

98. MODEL CODE OF JUDICIAL CONDUCT Preamble (1990).

99. *Id.*

100. *Id.*

101. J. SHAMAN, S. LUBET & J. ALFINI, JUDICIAL CONDUCT AND ETHICS 149 (1990).

102. MODEL CODE OF JUDICIAL CONDUCT Canon 3.B(7).

103. *Id.*

who are participants in the proceeding.¹⁰⁴ The commentary notes that when a judge communicates with an expert as permitted in limited circumstances, the preferred procedure is to invite the expert to file an amicus brief.¹⁰⁵ Further, the judge must give the parties notice of the identity of any expert with whom she has communicated and the substance of the communication and provide them with an opportunity to respond.¹⁰⁶ In every case, a judge must disclose to the parties all *ex parte* communications she has received.¹⁰⁷

The Model Code also strictly limits public comments a judge may make during a pending or impending proceeding. Canon 3.B(9) states: "A judge shall not . . . make any public comment that might reasonably be expected to affect [a proceeding's] outcome or impair its fairness."¹⁰⁸ The commentary points out that this prohibition continues during the entire appellate process until the final disposition of a matter.¹⁰⁹ However, the canon "does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."¹¹⁰ In addition to restricting public comment, the Canon prohibits judges from "mak[ing] any nonpublic comment that might interfere substantially with a fair trial or hearing."¹¹¹ However, the Model Code includes no specific time frame related to the litigation process in restricting nonpublic or private comments as it does for public comments. As a result, this limitation on nonpublic comment potentially could impact almost any private or personal communication between members of the judiciary and Congress whether or not the litigation of that matter has ended.

Canon 4 of the Model Code attempts to outline the extent to which a judge may participate in extrajudicial activities. This restriction affects a determination of which interactions between judges and legislators are appropriate because it governs what testimony judges may offer at public hearings. According to Canon 4.A., no extrajudicial activity may: "(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties."¹¹² More specifically, the commentary to this provision states a judge may speak, write, lecture, teach, and participate in other activities relating to the law, legal system, administration of justice, and other nonlegal subjects as long as these activities do not violate other provisions of the Model Code.¹¹³ However, the Canon does not expressly allow a judge to appear at a public hearing or consult with a legislative body or official on any subject other than the law, the legal system, or the administration of justice.¹¹⁴ As with the prohibition against nonpublic communications, this limitation on the subjects a judge may address in public testimony

104. *Id.* Canon 3.B(7) comment.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* Canon 3.B(9).

109. *Id.* Canon 3.B(9) comment.

110. *Id.* Canon 3.B(9).

111. *Id.*

112. *Id.* Canon 4.A.

113. *Id.* Canon 4.A comment.

114. *Id.*

potentially could affect a wide range of communications between the judiciary and Congress. Unless a judge testifies on a subject clearly pertaining to the law, the legal system, or the administration of justice, the Model Code suggests that the communication is improper on ethical grounds.

Despite the broad scope of these prohibitions, the commentary to Canon 4 recognizes the contribution a judge can make toward legislative reform. "As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice"¹¹⁵ This insight about the value of a judge's professional experience to assist in the development of the law on a nuts-and-bolts level is particularly true with respect to the interpretation and application of statutes drafted by Congress, much-needed reforms in criminal law and sentencing, and virtually all aspects of civil and criminal procedure. Most judges have developed valuable views on the practical aspects of these and other matters because their work on the bench requires them to test and adapt the law so it works in day-to-day practice. Judges know when a statute is ambiguous, unwieldy, impractical, or shortsighted as a result of problems encountered in drafting, the legislators' lack of experience with the justice system, or the reality of political compromise. Judges wrestle with interpreting the law on a daily basis, and their expertise should be regarded as an available and worthy resource that legislators regularly consider.

Canons 4 and 5 further define how judges may use their expertise about the legal system appropriately as they interact with other branches of government. Canon 4 states that judges may not accept appointments to government commissions or committees that deal with issues other than improvement of the law. The Model Code explains that the propriety of such activities must be evaluated in light of demands placed on a judge's time and resources by crowded dockets and the need to protect the judiciary from public controversy. Clearly, the major concern behind this restriction is the possibility of public controversy interfering with the "effectiveness and independence of the judiciary." Similarly, Canon 5 forbids judges entirely from holding office in any political organization, endorsing a candidate publicly for political office, making speeches for a political candidate, attending political gatherings, or soliciting funds for political campaigns.

Although the Model Code offers more guidance than the Constitution or federal statutes about appropriate conduct of judges, it fails to define exactly when permissible extrajudicial communications impair a judge's impartiality. The Model Code primarily tells judges what they and others already know—that is, when any activity impairs a judge's impartiality, she must abstain. Moreover, the Code even may have a seriously adverse effect on otherwise appropriate interaction by not providing specific guidelines for judges. Any concrete determination about appropriate interaction is left to a judge or the disciplinary process. Without specific guidelines, judges will continue to err on the

115. *Id.* Canon 4.B comment.

conservative side by isolating themselves from public and private debate on current issues that are not impending or pending in a case before the courts.

As noted before, any mutual antagonism and lack of cooperation between the two branches have resulted in part from failure to communicate in appropriate ways about common concerns. What we all need, and what the Constitution, the laws, and the Model Code do not provide, is a pragmatic approach to determine which specific extrajudicial interactions will not impair a judge's capacity to make independent determinations on issues facing the bench.

III. PRINCIPLES TO GUIDE INTERACTION BETWEEN JUDGES AND LEGISLATORS

Enhanced communication between judges and legislators would be a constructive development for government, and impediments to that development result from benign wariness rather than intentional disregard. Perhaps judges would be less wary if specific interactions could be measured against guiding principles that take into account the relevant constraints but still encourage communication.¹¹⁶ The presumption should favor open interchange between the two branches unless a specific constraint forbids it. Although formulating such a test is tantamount to the proverbial "nailing Jello to the wall," the following guidelines might assist judges as they consider fostering a relationship of communication with the legislative branch:

A. Does the communication concern the law, the legal system, or the administration of justice?

(1) If so, then the communication is presumed appropriate whether it takes place in a public hearing or private context. The scope of matters concerning the law, the legal system, or the administration of justice shall be interpreted broadly.

(2) If the communication does not concern the law, the legal system, or the administration of justice, it is presumed appropriate simply as *de minimus* personal communication not raising reasonable questions about a judge's impartiality.

B. The presumption of propriety may be overcome by showing the communication in question clearly violates a specific prohibition such as:

(1) Canon 3.B(7) of the Model Code prohibiting *ex parte* communications involving fewer than all the parties, witnesses, or attorneys in a pending or impending case that do not qualify for one of the limited exceptions stated in the Judicial Code;

(2) Canon 3.B(9) prohibiting: (a) public comment specifically related to a pending or impending judicial proceeding that might reasonably be expected to affect its outcome or impair its fairness and (b) nonpublic com-

116. This article has focused primarily on the relationship between the United States Congress and the federal judiciary. The proposed guidelines, however, also should serve as a guide to interaction between state legislatures and state courts.

ment that might substantially interfere with the fairness of that proceeding (Reasonability and substantiality under this subsection shall be evaluated using an objective standard.);

(3) Canon 3.B(11) prohibiting disclosure for any purpose unrelated to judicial duties and nonpublic information acquired in a judge's judicial capacity; or

(4) Canon 5.A.(1)(b)-(c), (e) prohibiting public endorsement of or opposition to a candidate for public office, speeches on behalf of a political organization or candidate.

The purpose of these proposed guidelines is to assist those involved in measuring the propriety of communications between judges and legislators. Naturally, not all communications will fit neatly into the proposed parameters but these guidelines may provide a starting point that could be helpful in developing more precise criteria that govern specific kinds of communication.¹¹⁷ As stated in subsection A(1), communications between judges and legislators are *presumed appropriate* if they relate to the law, the legal system, or the administration of justice. This presumption of propriety is intended to encourage communication and interaction between members of the judicial and legislative branches in order to promote efficient and effective development of the law.

This presumption of propriety replaces any explicit restrictions in the original Model Code of Judicial Conduct (1972) that were not incorporated in the revised Model Code. One deliberate omission from the revised Model Code relating to the possible impropriety of communication between judges and legislators was part of Canon 4 of the original Model Code. In that provision, a judge was permitted to consult with executive or legislative bodies outside of a public hearing *only* about the administration of justice. Possible implications of this provision include the prohibition of all private communications about the law, the legal system, or anything else not specifically pertaining to the administration of justice. Because the revised Model Code no longer expressly limits judges from communicating with legislative bodies or officials outside of a public hearing, such a limitation should not be implied in the revised Model Code. Limitations not incorporated in the revised Model Code should not continue to restrict otherwise appropriate interaction on a wide range of legal or personal matters. These proposed guidelines are intended to minimize any implicit assumptions or attitudes about the impropriety of communication between the judiciary and legislators not expressly prohibited in the revised Model Code.

Additionally, under subsection A(2) communications outside the broad category of the law, the legal system, and the administration of justice also are presumed appropriate as *de minimus* "personal communication."¹¹⁸ Personal

117. See, e.g., F. COFFIN, *The Federalist No. 86: On Relations Between the Judiciary and Congress in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 26-28 (R. Katzmann ed. 1988) (suggesting examples of communication that need specific criteria, such as a judge speaking against an official position of the Judicial Conference, a judge giving an assessment of judicial candidates to a member of Congress, a legislator's communication with a judge about a litigated case).

118. For my general recommendation about a *de minimus* rule, see letter from Judge Deanell Tacha to Subcommittee on Code of Judicial Conduct, Appellate Judges Conference of The American Bar Association (Sept. 14, 1989). In this letter I explained: "[I]t is essential to preserve for the judge and for the system itself the

communications rarely should be questioned on ethical grounds merely because they involve the interaction of legislators and judges. Frequent interaction is expected and encouraged among members of the judiciary and Congress who have legitimate professional and personal ties. It would be artificial to regulate these communications unless they are shown to contravene a specific prohibition of the Model Code. Personal discourse between judges and legislators should be viewed as appropriate interaction between colleagues with mutual interests engaged in a common task.

IV. CONCLUSION

This Article has attempted to point out the lack of historical, legal, or ethical impediments to enhanced communication between members of the judiciary and Congress. It also proposed guidelines that could enable us to overcome our natural inclination to limit communication for fear of apparent impropriety. The issues and problems that both the judicial and legislative branches confront are complex. They elude unilateral solution. However, our nation cannot afford the "static" produced when Congress and the judiciary fail to communicate effectively and debate vigorously on issues of mutual concern. It must be possible for the expertise and experience of judges and legislators to "blend" to achieve a better hookup without compromising the essential principles of judicial ethics and separation of powers. We must encourage the development of appropriate discourse. As communication and technology advance, perhaps E.T. *can* phone home.

ability to engage in benign social interaction, polite amenities, and community service, and to encourage a modicum of human empathy. Thus, some statement of [a] *de minimus* threshold would be an important addition to the Preamble." *Id.*

